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# Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent to Protect Their Confidential Sources

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# POOR RICHARD'S FORGOTTEN PRESS CLAUSE:

## HOW JOURNALISTS CAN USE ORIGINAL INTENT TO PROTECT THEIR CONFIDENTIAL SOURCES

### I. INTRODUCTION

“This Nurse of Arts, and Freedom’s Fence,  
To chain, is Treason against Sense:  
And *Liberty*, thy thousand Tongues  
None silence who design no Wrongs;  
For those that use the Gag’s Restraint,  
First rob, before they stop Complaint.”

-Benjamin Franklin, writing about a free press in *Poor Richard’s Almanack*, 1757<sup>1</sup>

As the Founding Fathers undoubtedly understood, the interests of the press frequently conflict with other important interests, including the government’s interest in enforcing its laws. After all, the Founders were intimately familiar with the plight of John Peter Zenger, a revolutionary colonist the royal government charged with seditious libel in 1735.<sup>2</sup> Zenger had published a criticism of New York’s crown governor and then refused to identify its author to the government.<sup>3</sup> Most scholars agree that Zenger’s case affected the way the Founders wrote the First Amendment’s Press Clause.<sup>4</sup> Most would also agree that the Founders viewed anonymity as central to the freedom of the press that the First Amendment

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1. Benjamin Franklin, *On the Freedom of the Press*, POOR RICHARD’S ALMANACK (1757), available at <http://www.freepress.org/journal.php?strFunc=display&strID=198&strJournal=24>.

2. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

3. *Id.*

4. See *id.*; see also Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 152-53 (1992) (describing Zenger as the “paradigm” speaker under an original view of the First Amendment).

guaranteed.<sup>5</sup> What is less clear, and what this Comment will discuss, is how *greatly* the Framers wanted to protect the press' freedom to withhold information from the government, particularly when it conflicts with other constitutional interests. At what point, for instance, should the interests of the press succumb to the criminal defendant's right to due process or the president's power to protect national security?

As this article goes to print, federal courts around the country are considering that question and uniformly siding against journalists. Last year, for example, the Second Circuit Court of Appeals told the *New York Times* to turn over phone records relating to the federal government's plan to freeze the assets and search the premises of two foundations suspected of raising money for terrorists.<sup>6</sup> The *Times* had published an article revealing the plan, tipping off the foundations to the government's operation, and prompting a grand jury investigation to determine who leaked the information.<sup>7</sup> Meanwhile, in California, a federal judge sentenced two *San Francisco Chronicle* reporters to serve eighteen months in jail for refusing to tell a grand jury who leaked secret testimony to them in the BALCO steroid investigation.<sup>8</sup> Those reporters avoided jail time only when the lawyer who leaked the testimony revealed himself—less than a month before the Ninth Circuit Court of Appeals was scheduled to hear the journalists' appeal.<sup>9</sup> These rulings, though disparaged by journalists, are not surprising given that the Supreme Court limited the scope of the Press Clause in the 1972 case of *Branzburg v. Hayes*.<sup>10</sup> What is surprising is how quickly journalists have abandoned the constitutional argument when seeking to shield themselves from grand jury investigations. In fact, journalists have focused almost exclusively on pressing a statutory argument that Rule 501 of the Federal Rules of Evidence, adopted after the Supreme Court decided *Branzburg*, gives the federal courts the power to recognize an evidentiary reporter's privilege.<sup>11</sup>

This Comment recognizes the strengths of that approach but exposes the flaws in relying purely on a straightforward application of Rule 501 to

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5. See *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring) (noting that Zenger's trial "signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind").

6. See *N.Y. Times v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006).

7. *Id.*

8. Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRON., Feb. 15, 2007, at A18.

9. *Id.* at A1.

10. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972).

11. See, e.g., *Gonzales*, 459 F.3d 160; *In re Grand Jury Subpoena*, Judith Miller, 405 F.3d 17 (D.C. Cir. 2005).

pursue a reporter's privilege, criticizing the reporters' lawyers for deemphasizing the privilege's constitutional underpinnings. Thus, Part II of this Comment provides a historical background, reviewing the support for and opposition to the reporter's privilege, from Zenger's trial to the *Branzburg* decision. Part III analyzes the judicial and legislative response to *Branzburg*, explaining how journalists abandoned their quest to secure a constitutional privilege in favor of a privilege secured by Rule 501. Part IV questions the narrowness of that approach. As a proposed alternative, this Comment demonstrates that, by focusing on the colonial background, journalists can use an original intent approach to frame their privilege argument, and win the votes of skeptical Supreme Court justices.

## II. BACKGROUND

### A. Colonial Roots

We have grown so accustomed to the First Amendment freedom of the press that it is easy to forget how uniquely American the right is.<sup>12</sup> Indeed, unlike much of the federal Constitution, which the Framers modeled after the writings of seventeenth and eighteenth century philosophers like John Locke,<sup>13</sup> the freedom of the press arose out of the colonists' own experience with the British royal government. In 1722, for example, a young Benjamin Franklin and his brother James, publisher of Boston's *New England Courant*, were brought before the Massachusetts Assembly to reveal the authors of several *Courant* pieces that the government deemed libelous.<sup>14</sup> They both refused and the Assembly censured and jailed James Franklin for one month (although it let Benjamin off with a warning).<sup>15</sup> Then came Zenger's case.

Zenger published the *New York Weekly Journal*, a newspaper that reprinted essays from across England and America, as well as advertisements and letters about local issues (generally printed under

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12. See WILLIAM LOWELL PUTNAM, JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM 5 (1997) ("No other nation in the world or throughout human history has made [freedom of speech and the press] a fundamental and absolute part of its political and social system.").

13. For example, Locke first articulated the concept of the separation of powers, where a legislative body charged with making laws shared authority with an executive charged with executing the laws. See generally JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 82–85 (Prometheus Books 1986).

14. Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 233–34 (1974).

15. *Id.* at 234.

pseudonyms) that often attacked New York's royal governor.<sup>16</sup> Tensions between Zenger and the governor peaked after the September 1734 city elections, in which New Yorkers elected several of the governor's opponents as magistrates.<sup>17</sup> Zenger published two ballads commemorating the men's election, calling the governor and his supporters "pettyfogging knaves" and asserting that the newly-elected magistrates would "make the scoundrel rascals fly."<sup>18</sup>

The royal government, which had already tried to indict Zenger on seditious libel charges, brought charges again following the publication of the ballads.<sup>19</sup> While the governor failed to win over a grand jury,<sup>20</sup> he convinced the New York Council to pursue Zenger. The Council issued a warrant to burn four issues of the *Journal* and ordered that Zenger be imprisoned.<sup>21</sup> The government eventually brought Zenger to trial for seditious libel in 1735.<sup>22</sup> Ironically, Zenger was represented by Andrew Hamilton, who had participated in Pennsylvania's prosecution of Andrew Bradford for seditious libel in 1729.<sup>23</sup> Regarded at the time as one of America's best lawyers<sup>24</sup>, Hamilton vigorously defended Zenger and the individual's freedom to criticize and complain to the government.<sup>25</sup> He succeeded—the trial lasted a single day and the jury acquitted Zenger after conferring for only a few minutes.<sup>26</sup>

Zenger's trial had a lasting impact on the American colonists. Gouverneur Morris, the Pennsylvanian credited with drafting much of the federal Constitution, called the trial "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."<sup>27</sup> The First Continental Congress considered the freedom of the press

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16. JAMES ALEXANDER, A BRIEF NARRATIVE ON THE CASE AND TRIAL OF JOHN PETER ZENGER 8–9 (Stanley Nider Katz ed., Harvard Univ. Press 1972). In fact, Zenger's newspaper relentlessly criticized the royal governor, William Cosby, describing him in one instance as a monkey. *Id.* at 9.

17. *Id.* at 13–14.

18. Freedom First, <http://www.radford.edu/~wkovarik/class/history/ff.ideas2a.html> (last visited Jan. 25, 2007).

19. See Alexander, *supra* note 16, at 17.

20. See *id.*

21. See *id.* at 17–18.

22. *Id.* at 20.

23. See *id.* at 22.

24. *Id.*

25. See Alexander, *supra* note 16, at 84 ("I beg leave to insist that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and those restraints can only extend to what is false." (emphasis in original)).

26. *Id.* at 23.

27. See Putnam, *supra* note 12, at 4.

"essential to 'the advancement of truth, science, morality and arts in general' and to the maintenance of 'honorable and just modes' of conducting public affairs."<sup>28</sup> The impact of Zenger's trial—and the nascent freedom of the press—appeared even more strikingly in 1779, while the Second Continental Congress was meeting in Philadelphia. During one session, Massachusetts delegate Elbridge Gerry demanded that the printer of the *Pennsylvania Packet* identify the individual who wrote an anonymous article that criticized Congress for causing inflation in the States and alleged that some members had committed embezzlement and fraud.<sup>29</sup> However, Virginia delegate Merriweather Smith countered that to bring the printer before the Congress and force him to reveal the author's identity would offend the freedom of the press, reasoning that "[w]hen the liberty of the Press shall be restrained . . . the liberties of the People will be at an end."<sup>30</sup> The delegates agreed and Gerry's proposal failed.<sup>31</sup> Ten years later, Congress adopted the First Amendment, proclaiming that it would "make *no* law . . . abridging the freedom of speech, or of the press."<sup>32</sup>

*B. The Deterioration of the Press Clause in the Nineteenth and Twentieth Centuries and Its Resurrection in Garland v. Torre*

Despite the strong historical underpinnings, Congressional respect for freedom of the press deteriorated during the nineteenth century. One example is particularly telling. In 1848, *New York Herald* correspondent John Nugent reported that the United States had signed a secret treaty with Mexico.<sup>33</sup> As Elbridge Gerry tried to do in 1779, Congress hauled Nugent into a hearing and demanded that he reveal who had given him a copy of the treaty.<sup>34</sup> When he refused, Congress confined Nugent inside the Capitol building, effectively placing him under arrest.<sup>35</sup> And the federal courts, to whom Gerry appealed for habeas corpus relief, refused to

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28. LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, at xix (2d ed. 1996) (quoting FIRST CONTINENTAL CONGRESS, *To the Inhabitants of the Province of Quebec*, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 108 (1937)).

29. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring). Dr. Benjamin Rush, a Pennsylvania physician and signer of the Declaration of Independence, wrote the article under the pseudonym "Leonidas." *Id.*

30. *Id.* at 362 (additional quotation marks omitted).

31. See *id.*

32. U.S. CONST. amend. I (emphasis added).

33. *Ex parte Nugent*, 18 Fed. Cas. 471, 471-72 (D.C. Cir. 1848).

34. See *id.* at 471-72.

35. See *id.*

intervene, giving Congress wide authority to punish contempt of its investigatory power.<sup>36</sup> This trend continued into the twentieth century—so much so that journalists stopped invoking the First Amendment when trying to protect information from government investigations. Thus, in 1913, when a New Jersey grand jury asked a reporter to disclose who had told him about charges made during a private meeting of municipal trustees, he refused to answer without invoking the First Amendment.<sup>37</sup> One year later, a federal court in Hawaii threatened to jail a Honolulu newspaper editor whose paper had published a grand jury's vote before it was reported publicly because the editor would not reveal the source of the information.<sup>38</sup> Like the New Jersey journalist before him, the editor claimed a general privilege not to disclose the newspaper's source and grounded his argument purely on economic substantive due process grounds rather than on the First Amendment.<sup>39</sup> According to the editor:

The same as would be the reason of *any* gentleman of the jury against giving his private *business* secrets publicity. It is our source of news that we rely on to enable us to get out a newspaper; and if we break confidence with the source of news we would lose all of our sources and would have no newspaper.<sup>40</sup>

Similarly, in 1935, *New York American* reporter Martin Mooney reported that gambling and lottery violations were still occurring in New York despite a grand jury's investigation of the alleged crimes.<sup>41</sup> The grand jury called Mooney as a witness but he refused to identify those who had given him information about the rackets.<sup>42</sup> Without discussing the First Amendment, Mooney analogized his privilege claim to the common-law privileges that existed for communications made to a judge, district

36. *See id.* at 483 (“[T]he senate of the United States has power, when acting in a case within its jurisdiction, to punish all contempts of its authority.”).

37. *See In re Grunow*, 85 A. 1011, 1011–12 (N.J. 1913). While Grunow did not explicitly cite the First Amendment, he argued that he did not have to disclose such information because “I was a newspaper reporter, and therefore could not give up my sources of information.” *Id.* at 1012.

38. *In re Wayne*, 4 U.S.D.C. 475, 475–78 (D. Haw. 1914). The editor eventually revealed the source and avoided jail time. *See id.* at 478.

39. *Id.* at 475–78.

40. *Id.* at 475–76 (emphasis added). Of course, the economic substantive due process overtones in this argument should not be surprising given that the case arose during the height of the *Lochner* era, which protected economic liberty interests against almost all government interference. *See generally* ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 2.2 (3d ed. 2004).

41. *People ex rel. Mooney v. Sheriff of N.Y. County*, 199 N.E. 415, 415 (N.Y. 1936).

42. *Id.*

attorney, or police officer.<sup>43</sup> He argued that the same rationale for protecting information disclosed in those relationships extended to the reporter-source relationship.<sup>44</sup> The court rejected his claim.<sup>45</sup>

That trend changed in 1958 when *New York Herald Tribune* columnist Marie Torre asserted that her conversations with a confidential source were protected by both the First Amendment and common law evidentiary privileges.<sup>46</sup> The case involved a libel lawsuit filed by actress Judy Garland against CBS. In one of her "TV-Radio Today" columns, Torre had quoted a CBS network executive as saying that "something is bothering [Garland] . . . I don't know, but I wouldn't be surprised if it's because she thinks she's terribly fat."<sup>47</sup> After they failed to identify the source by deposing various CBS executives, Garland's attorneys deposed Torre.<sup>48</sup> Torre refused to identify her source because it was confidential and she argued that, if she violated that confidence, "nobody in the business [would] talk to [her] again."<sup>49</sup>

The Second Circuit Court of Appeals rejected both of Torre's arguments—first, that her conversations were protected by the First Amendment and, second, that a common law evidentiary privilege protected the conversations.<sup>50</sup> Interestingly, the court did not find that the First Amendment provided *no* privilege to a reporter. Instead, it held that Torre's privilege to protect her confidential sources in a judicial proceeding:

[Had] nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures.<sup>51</sup>

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43. *Id.* at 415.

44. *Id.*

45. *See id.*

46. *See* *Garland v. Torre*, 259 F.2d 545, 547–48 (2d Cir. 1958); *see also* STEPHEN BATES, *THE REPORTER'S PRIVILEGE: THEN AND NOW* 2 (2000), available at [http://www.ksg.harvard.edu/presspol/research\\_publications/papers/research\\_papers/R23.pdf](http://www.ksg.harvard.edu/presspol/research_publications/papers/research_papers/R23.pdf) (also noting that Torre's First Amendment argument was the first to reach one of the federal circuit courts).

47. *See* BATES, *supra* note 44, at 2.

48. *Id.* at 3.

49. *Garland*, 259 F.2d at 547; BATES, *supra* note 44, at 3.

50. *Garland*, 259 F.2d at 550.

51. *Id.* at 549 (quoting *Bridges v. California*, 314 U.S. 252, 291 (1941) (Frankfurter, J.,



In this vein, the court left open the possibility of a future First Amendment-based privilege challenge, saying, "[W]e are not dealing here with the use of the judicial process to force a *wholesale disclosure* of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of *doubtful relevance* or materiality."<sup>52</sup> Judge—later Justice—Potter Stewart expressly recognized that "in the domain of indispensable First Amendment liberties, it is essential 'not to limit the protection of the right to any particular way of abridging it' . . . . '[A]bridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.'"<sup>53</sup>

Though her constitutional contention did not help Torre win her case, Judge Stewart's response encouraged journalists to keep making the argument. Thus, after *Garland*, reporters who were confronted with orders to reveal their confidential sources consistently asserted a constitutional privilege to protect the information.<sup>54</sup> Predictably though, courts around the country could not agree on the matter. Two cases in particular demonstrate the divergent views these courts took on the First Amendment argument. The 1968 case *State v. Buchanan* arose when a student writer refused to disclose her sources to a grand jury investigating marijuana use in Lane County.<sup>55</sup> The writer, Annette Buchanan, promised seven

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dissenting)). In *Bridges*, a California court held Harry Bridges (a prominent labor leader) and the Times Mirror Co. (publisher of the *Los Angeles Times*) in contempt of court for comments they had made about pending litigation. The parties challenged their convictions as abridging their freedom of speech and freedom of the press, in violation of the First Amendment, ultimately taking their case all the way to the Supreme Court. The Court, in an opinion by Justice Black, agreed and reversed the convictions, although it did not expressly announce which clause of the First Amendment supported its decision. *Bridges v. California*, 314 U.S. 252, 278 (1941). The Court grounded its analysis in the proposition that suppression of speech is only justified by "reasonable ground to fear that serious evil will result if free speech is practiced [where the] danger apprehended is imminent." *Id.* at 262 n.5 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)). Justice Frankfurter's dissent excoriated the ambiguity of the majority's opinion and its conclusion that a state judge could not use the express power of the court to administer justice, saying that "[f]ree speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." *Id.* at 282 (Frankfurter, J., dissenting).

52. *Garland v. Torre*, 259 F.2d 545, 549–50 (2d Cir. 1958) (emphasis added).

53. *Id.* at 548 (additional quotation marks and citations omitted).

54. See, e.g., *State v. Knops*, 183 N.W.2d 93, 95 (Wis. 1971); *State v. Buchanan*, 436 P.2d 729, 729 (Or. 1968). The journalists in *Knops* and *Buchanan* both invoked *Garland* for support in their First Amendment claims but the courts reached different opinions. The Wisconsin Supreme Court recognized that *Knops* had a constitutional right to the privilege but concluded that "when such confidence is in conflict with the public's overriding need to know, it must yield to the interest of justice," and the privilege yielded in *Knops*' case. *Knops*, 183 N.W.2d at 99. In *Buchanan*, the Oregon Supreme Court held that reporters had no such constitutional right, though it could be created by statute. *Buchanan*, 436 P.2d at 732.

55. *Buchanan*, 436 P.2d at 729–30.

marijuana users confidentiality if they allowed her to interview them for her article on student use of the drug.<sup>56</sup> A state trial court ordered her to reveal her sources, but Buchanan refused, claiming in part that the First Amendment protected the information.<sup>57</sup> Both the trial court and the Oregon Supreme Court rejected Buchanan's constitutional claim.<sup>58</sup> The high court refused to recognize a constitutional right that would be limited to certain individuals—the press—rather than the public at large.<sup>59</sup> The court stated that “it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.”<sup>60</sup> Thus, the court simply held that no constitutional privilege existed.<sup>61</sup>

Meanwhile, in the 1971 case *State v. Knops*, the Wisconsin Supreme Court reached the opposite conclusion, finding that the First Amendment endowed journalists with a right to withhold information from grand jury inquiries.<sup>62</sup> *Knops* grew out of a grand jury investigation involving the alleged arson of the “Old Main” hall at the Wisconsin State University at Whitewater.<sup>63</sup> Less than two months into this investigation, an explosion at Sterling Hall on the campus of the University of Wisconsin at Madison killed one person and injured several others.<sup>64</sup> The grand jury also investigated the Sterling Hall explosion, specifically inquiring into whether the explosion was linked to the Whitewater fire, and whether it had been planned in the same county.<sup>65</sup> A day after the grand jury reconvened, Mark Knops, an editor of the Madison *Kaleidoscope*, published an article titled “The Bombers Tell Why and What Next—Exclusive to Kaleidoscope.”<sup>66</sup> The grand jury demanded that Knops reveal the sources for his story. He refused and the court held him in contempt, sentencing him to serve six months in jail, subject to release if he answered the Grand Jury's

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56. *Id.* at 730.

57. *See id.*

58. *Id.* at 730-32.

59. *See id.* at 731.

60. *Id.* (footnote omitted).

61. *State v. Buchanan*, 436 P.2d 729, 732 (Or. 1968).

62. *See State v. Knops*, 183 N.W.2d 93, 99 (Wis. 1971).

63. *Id.* at 94.

64. *Id.*

65. *Id.*

66. *Id.*

questions.<sup>67</sup> In his petition for a writ of habeas corpus to the Wisconsin Supreme Court, Knops asserted that the First Amendment protected his refusal to reveal the sources to the grand jury.<sup>68</sup> The court noted that Knops' theory was "of recent vintage," and cited *Garland* as the first case to recognize a reporter's privilege grounded in the Constitution.<sup>69</sup> The court further stated that, despite the "uncertainty and inconsistency" surrounding the reporter's privilege around the country,<sup>70</sup> the First Amendment did include a *qualified* privilege not to disclose the source of confidential information.<sup>71</sup> Unfortunately for Knops, his confidence—which involved ongoing criminal activity—was outweighed by the public's right to know who the bombers were, and to prosecute them.<sup>72</sup> Thus, the court affirmed Knops's conviction.<sup>73</sup>

This trend of diverging opinions culminated—or so it seemed—with *Branzburg v. Pound* and *Branzburg v. Meigs*,<sup>74</sup> *In re Pappas*,<sup>75</sup> and *United States v. Caldwell*.<sup>76</sup> The Supreme Court consolidated these four cases for review as *Branzburg v. Hayes* in 1971.<sup>77</sup> The two *Branzburg* cases involved articles written by Louisville *Courier-Journal* reporter Paul Branzburg about drug production in Kentucky.<sup>78</sup> The first article described the operation of two Jefferson County residents who claimed they had earned five thousand dollars by synthesizing hashish from marijuana.<sup>79</sup> Shortly after the article appeared, Branzburg was called to testify before a Jefferson County grand jury that was investigating the local drug trade.<sup>80</sup> He refused to identify the men to either the grand jury or the state trial judge.<sup>81</sup> The trial judge held Branzburg in contempt, rejecting his arguments that either the First Amendment, Kentucky's reporter privilege

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67. *Id.*

68. *State v. Knops*, 183 N.W.2d 93, 94 (Wis. 1971).

69. *Id.* at 95.

70. *Id.* at 97.

71. *See id.* at 99.

72. *Id.*

73. *Id.*

74. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970). The Kentucky Court of Appeals' decision in *Branzburg v. Meigs* was not published.

75. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

76. *United States v. Caldwell*, 434 F.2d 1081 (9th Cir. 1970).

77. *Branzburg v. Hayes*, 408 U.S. 665, 665 (1972).

78. *Id.* at 667–69 (1972).

79. *Id.* at 667.

80. Douglas McCollam, *Attack at the Source*, COLUM. JOURNALISM REV., Mar.-Apr. 2005, at 29–30. *Branzburg v. Hayes*, 408 U.S. 665, 667–69 (1972).

81. *Branzburg*, 408 U.S. at 668.

statute, or the Kentucky Constitution authorized his disobedience.<sup>82</sup> Branzburg appealed his conviction to the Kentucky Court of Appeals, which first held that he had abandoned the First Amendment argument.<sup>83</sup> The court rejected Branzburg's state constitutional claim and also construed the Kentucky privilege statute as only protecting reporters when a confidential source supplies them with information, not when reporters are summoned to testify about events they personally observed, even if that required identifying the confidential sources.<sup>84</sup>

The second article that Branzburg wrote concentrated on drug use in Frankfort, Kentucky.<sup>85</sup> Branzburg spent two weeks in Frankfort and interviewed "several dozen drug users."<sup>86</sup> He was then called to testify before another grand jury which was investigating the use and sale of drugs in Franklin County, which encompasses Frankfort.<sup>87</sup> Branzburg again refused to testify and despite having obtained an order from the trial court protecting him from revealing "confidential associations, sources or information," sought relief from Kentucky's Court of Appeals.<sup>88</sup> The Court of Appeals denied Branzburg relief and explicitly rejected his First Amendment claim as "so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press . . . ."<sup>89</sup>

*In re Pappas* involved a television reporter's coverage of a Black Panther news conference in New Bedford, Massachusetts.<sup>90</sup> Prior to the press conference, the Panthers had barricaded a number of streets surrounding their headquarters, allegedly setting fires and discharging firearms in the streets.<sup>91</sup> Paul Pappas, the reporter who covered the event, returned to Panther headquarters after the press conference and was allowed to enter and remain inside while waiting for an anticipated police raid to occur.<sup>92</sup> Pappas agreed not to report on anything that occurred

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82. *Id.*

83. *Id.* at 668–69.

84. *Id.* at 669.

85. *Id.*

86. *Id.*

87. *Branzburg v. Hayes*, 408 U.S. 665, 669 (1972).

88. *Id.* at 669–70 (internal quotation marks omitted).

89. *Id.* at 671 (additional quotation marks omitted).

90. *Id.* at 672. See generally Dr. Huey P. Newton Foundation, *What Was the Black Panther Party?*, <http://www.blackpanther.org/legacynew.htm> (last visited Feb. 26, 2007). The Black Panthers formed in the mid-1960s to support the African-American civil rights movement. Under the leadership of Huey Newton, it became known for its aggressive and occasionally militant tactics.

91. *Branzburg*, 408 U.S. at 672.

92. *Id.*

inside the headquarters except for the anticipated police raid—but the raid never occurred and Pappas never reported on the experience at all.<sup>93</sup> Nonetheless, two months later, a Massachusetts grand jury subpoenaed Pappas and asked him to discuss what he had seen and heard at the Panther headquarters.<sup>94</sup> Pappas refused to answer questions under the first subpoena as well as under a second, broader order to discuss *any* “evidence as he knows relating to *any* matters which may be inquired of on behalf of the Commonwealth . . . .”<sup>95</sup> Pappas challenged the summons on several grounds, including the First Amendment, but the trial judge rejected his arguments.<sup>96</sup> So too did the State Supreme Judicial Court, which stated that “there exists no constitutional newsman’s privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.”<sup>97</sup>

*United States v. Caldwell* also arose out of a reporter’s coverage of the Black Panthers.<sup>98</sup> Earl Caldwell covered the Panthers for *The New York Times*.<sup>99</sup> A federal grand jury in the Northern District of California, which was investigating the Panthers for a number of possible crimes, including civil disorder and threatening the President of the United States, subpoenaed Caldwell twice.<sup>100</sup> While Caldwell temporarily staved off the first subpoena—which asked him to bring notes and tape recordings of essentially *all* his interviews with Panther officials—by objecting to its scope, a federal district court denied his motion to quash the second subpoena, which ordered him to simply appear before the Grand Jury.<sup>101</sup> But despite its ruling, the court recognized that Caldwell had a qualified, First Amendment-based privilege to not reveal “confidential associations, sources or information received” unless the government could show that there was a “compelling and overriding national interest in requiring Mr. Caldwell’s testimony which cannot be served by any alternative means.”<sup>102</sup>

Caldwell avoided appearing before the grand jury after this ruling because its term had expired.<sup>103</sup> Nevertheless, when the new grand jury

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93. *Id.*

94. *Id.* at 672–73.

95. *Id.* at 673 (emphasis added) (internal quotation marks omitted).

96. *Id.*

97. *Branzburg v. Hayes*, 408 U.S. 665, 674 (1972) (internal quotation marks omitted).

98. *Id.* at 675.

99. *Id.*

100. *Id.* at 675–77.

101. *Id.* at 677–78.

102. *Id.* (quoting Application of Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970) (internal quotation marks omitted)).

103. *Branzburg v. Hayes*, 408 U.S. 665, 678 (1972).

convened, it summoned Caldwell again and he refused to appear.<sup>104</sup> The district court entered essentially the same order in response to Caldwell's motion to quash as it had in the first instance, but it also ordered that Caldwell appear before the grand jury to respond to the subpoena.<sup>105</sup> He refused, was held in contempt, and appealed his conviction to the Ninth Circuit Court of Appeals.<sup>106</sup> The Ninth Circuit reversed the conviction, holding that the First Amendment provided Caldwell with a qualified testimonial privilege and that he could refuse to appear before the grand jury because the government had not demonstrated a compelling need for Caldwell's presence.<sup>107</sup>

*C. The Supreme Court Finds That the First Amendment Does Not Protect Confidential Reporter-Source Conversations from Criminal Investigations*

In the collective *Branzburg* cases, the Supreme Court rejected claims that the First Amendment privileged reporters from disclosing information and identities of confidential sources.<sup>108</sup> Writing for the Court, Justice White interpreted the First Amendment narrowly. He argued that "the First Amendment does not invalidate every incidental burdening of the press . . . ."<sup>109</sup> In that respect, he minimized the intrusiveness of forcing reporters to reveal their confidential sources from prior restraints and forced speech, which the Court traditionally subjected to the strictest scrutiny, noting that "[t]he use of confidential sources by the press is not *forbidden or restricted*; reporters remain free to seek news from any source by means within the law."<sup>110</sup> Citing the grand jury's "important, constitutionally mandated role" in the law enforcement process, the Court refused to recognize a journalist's constitutional privilege to avoid that process.<sup>111</sup> Nonetheless, the Court explained the scope of its holding:

This conclusion . . . does [not] threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess

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104. *Id.*

105. *Id.*

106. *Id.* at 678-79.

107. See *United States v. Caldwell*, 434 F.2d 1081, 1089 (9th Cir. 1970).

108. See *Branzburg*, 408 U.S. at 702-04.

109. *Id.* at 682 (internal quotation marks omitted).

110. *Id.* at 681-82 (emphasis added).

111. *Id.* at 690-91.

information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.<sup>112</sup>

Justices Douglas, Stewart, Brennan, and Marshall dissented. Douglas interpreted the First Amendment as necessarily including the right to not appear before a grand jury but went a step further, vilifying the reporters' claims that the privilege was qualified.<sup>113</sup> Douglas believed that "all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in this case."<sup>114</sup> Moreover, Douglas asserted that the effect of denying the privilege would "deprive the people of the information needed to run the affairs of the Nation in an intelligent way."<sup>115</sup> Brennan and Marshall joined Stewart's dissent. In their view, the Framers created the constitutional guarantee of freedom of the press as a benefit for the people as a whole and included a right to gather news free from government interference.<sup>116</sup> To be effective, the Justices argued, this right required that a reporter have the right to a confidential relationship with his sources because they are a necessary part of the modern news-gathering process.<sup>117</sup> However, while Stewart found that a First Amendment privilege existed, he recognized it as only a qualified privilege that the government could overcome when it: (1) shows probable cause to believe that the journalist had "information that [was] clearly relevant to a specific probable violation of the law"; (2) demonstrates that it could not obtain the information by any other means that did not infringe the reporter's First Amendment rights; and (3) has a compelling interest in seeking the information.<sup>118</sup> The dissenting Justices acknowledged the difficulty inherent in making some of these decisions, but determined, "[b]etter such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases."<sup>119</sup>

Despite its criticism of the constitutional argument, the majority

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112. *Id.* at 691.

113. *Id.* at 712-13 (Douglas, J., dissenting).

114. *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

115. *Id.* at 723 (Douglas, J., dissenting).

116. *See Branzburg*, 408 U.S. at 726-28 (Stewart, J., dissenting).

117. *See id.* at 728-29.

118. *Id.* at 743. In discussing the third prong of his balancing test, Justice Stewart cited his suggestion in *Garland* that the courts not recognize the privilege when "[t]he question asked . . . went to the heart of the plaintiff's claim." *Id.* at 743 n.33.

119. *Id.* at 745-46.

encouraged Congress and state legislatures to create a statutory privilege “as narrow or broad as deemed necessary” for journalists<sup>120</sup> Journalists might have saved thirty-plus years of legal bills and headaches if the Court had stopped there. Instead, Justice Powell, who also joined the majority’s opinion, wrote a concurrence. Powell’s concurrence—all of four paragraphs that take up less than two of the eighty-seven pages the Court devoted to the case—would combine with Stewart’s dissent to establish the foundation of the journalist’s privilege for the next twenty-five years.<sup>121</sup> Justice Powell suggested that the majority was not hostile to the idea of a reporter’s privilege, but that:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital *constitutional* and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.<sup>122</sup>

Powell stopped short of endorsing Stewart’s balancing test, stating that it placed too great a burden on the government and “would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.”<sup>123</sup>

### III. THE RESPONSE TO *BRANZBURG*

#### A. *Confusion in the Courts, Backlash in the States, And a Lot of Talk in Congress*

The *Branzburg* decision caused great confusion in the lower federal courts, with Powell’s concurrence as the greatest sticking point.<sup>124</sup> How could the courts reconcile Powell’s concurrence with the sweeping

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120. *Id.* at 706.

121. See, e.g., Brief for Appellees WDSU-Television et. al at 13–14, *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998) (No. 97-30320) (citing the “4-1-4” decision in *Branzburg* for support in “recognizing a qualified journalist’s privilege”).

122. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (emphasis added).

123. *Id.* at 710 n.\*.

124. For a good, succinct overview of how the federal circuits have interpreted *Branzburg*, and how their interpretations conflict with the state privilege laws inside the circuit, see Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 479–91 (2003).



language of Justice White's opinion, which Powell joined, and which scorned the journalists by suggesting they seek refuge in the legislature? Predictably, the federal circuits reached very different conclusions. The Third Circuit interpreted *Branzburg* as rejecting only an *absolute* privilege for journalists in criminal cases.<sup>125</sup> The Third Circuit therefore invoked Justice Powell's concurrence to recognize a qualified privilege,<sup>126</sup> measured by a three-prong balancing test analogous to that suggested in Justice Stewart's dissent.<sup>127</sup> The Sixth Circuit strictly followed the *Branzburg* majority, rejecting any privilege except when the government sought information as part of a bad-faith investigation.<sup>128</sup> The Ninth Circuit adopted the same approach as the Sixth Circuit, only protecting reporters when a grand jury investigation is conducted in bad faith, although it took pains to recognize the constitutional nature of the freedom.<sup>129</sup> However, the Ninth Circuit also limited *Branzburg* to grand jury proceedings, and created a balancing test to determine whether the privilege applied outside the grand jury context.<sup>130</sup>

Meanwhile, the states reacted in relative unison. While seventeen states already had laws protecting reporters from being forced to divulge confidential information,<sup>131</sup> another thirteen, in addition to the District of Columbia, adopted some kind of statutory protection after *Branzburg*.<sup>132</sup> In

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125. *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980).

126. *Id.*

127. *Id.* at 358–59. The Third Circuit calls this test the “Riley test” because it was developed in *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979). The test requires that the government or other moving party (1) demonstrate that it has made “an effort to obtain the information from other sources, (2) demonstrate that the journalist and his or her sources provide the only access to the information and (3) show “that the information sought is crucial to the claim.” *Criden*, 633 F.2d at 358–59; cf. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting) (discussing the three-part test suggested by the *Branzburg* dissenters).

128. *In re Grand Jury Proceedings (Storer Commc'ns, Inc.)*, 810 F.2d 580, 584, 586 (6th Cir. 1987).

129. *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 400 (9th Cir. 1993) (quoting *Branzburg*, 408 U.S. at 707).

130. *Id.* at 402 (explaining that the court balanced the interests in some cases, and not others, when the case “did not involve testimony before a grand jury. Indeed, we acknowledged that “[t]he precise holding of *Branzburg* [had] subordinated the right of the newsmen to keep secret a source of information in [the] face of the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct”) (citation omitted)).

131. *Branzburg*, 408 U.S. at 689 n.27 (listing Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania as those states). The *Branzburg* court forgot to include Rhode Island, which passed a shield law in 1956. R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1956).

132. COLO. REV. STAT. ANN. § 13-90-119 (West 2006); D.C. CODE §§ 16-4701 to -4704

the nineteen states that did not adopt a shield law, appellate courts in at least eleven recognized a journalistic privilege based on their state constitutions or the common law.<sup>133</sup> Most of those courts narrowed *Branzburg*'s reach. For example, the Idaho Supreme Court read *Branzburg* in the "now widely accepted view . . . that [*Branzburg*] was limited by the specific facts presented by the consolidated cases, and that a case-by-case analysis must be used in 'balancing freedom of the press against a compelling and overriding public interest in the information sought.'" <sup>134</sup> For support, it cited several decisions from other courts that had limited *Branzburg*—two of which the Supreme Court declined to hear.<sup>135</sup>

Congress also reacted swiftly to *Branzburg*—although it accomplished much less than the state legislatures. On the day after the Supreme Court announced its decision, California Senator Alan Cranston introduced a bill that would have given reporters an absolute privilege in both federal and state proceedings.<sup>136</sup> Senator Cranston's efforts foreshadowed the inevitable onslaught of such bills, as journalists and their supporters waged an "all-out effort" to pass a federal shield law.<sup>137</sup> By the time the 92nd Congress adjourned at the end of 1972, over twenty bills had

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(2001) (D.C.'s first shield law was passed in 1981 but the current version was passed in 1992); DEL. CODE ANN. tit. 10, §§ 4320–26 (1973); FLA. STAT. § 90.5015 (1998); GA. CODE ANN. § 24-9-30 (1990); 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (West 2006) (first passed in 1981 but amended several times); MINN. STAT. §§ 595.021–.025 (1999); NEB. REV. STAT. ANN. §§ 20-144 to -147 (West 2006) (passed in 1973); N.C. GEN. STAT. § 8-53.11 (2006) (passed in 1999); N.D. CENT. CODE § 31-01-06.2 (1999) (first passed 1973); OKLA. STAT. tit. 12, § 2506 (first passed in 1978 but amended in 2002 to substitute the word "journalist" for "newsman"); OR. REV. STAT. §§ 44.510–.540 (2003) (first passed in 1973 and amended in 1979, 2001); S.C. CODE ANN. § 19-11-100 (2000) (first passed in 1976 and amended in 1993); TENN. CODE ANN. § 24-1-208 (2000) (passed in 1973). Some of these states went further, deciding to protect even non-confidential material the journalist receives while gathering news. Compare N.C. GEN. STAT. § 8-53.11 (passed in 1999) (broadly protecting "any confidential or nonconfidential information, document, or item.") (emphasis added), with COLO. REV. STAT. ANN. § 13-90-119 (West 2006) (offering a similarly broad definition but exempting material gathered at a news conference, information gathered through publication or broadcast, or information based on a journalist's personal observation of certain felonies for example).

133. Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35, 47 & n.71 (2006) (listing Idaho, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, South Dakota, Vermont, Virginia, Washington, and Wisconsin as the states that have explicitly recognized the privilege since *Branzburg*).

134. *In re Contempt of Wright*, 700 P.2d 40, 43 (Idaho 1985) (quoting *Zelenka v. State*, 266 N.W.2d 279, 287 (Wis. 1978)).

135. *Id.* at 43. The Supreme Court denied certiorari in two cases the Idaho Supreme Court relied on: *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), and *State v. Sandstrom*, 581 P.2d 812, 814–15 (Kan. 1978), *cert. denied sub nom*, *Pennington v. Kansas*, 440 U.S. 929 (1979).

136. S. 3786, 92d Cong. (1972); 118 CONG. REC. 23,598 (June 30, 1972).

137. Ervin, *supra* note 14, at 256.

been introduced in the House<sup>138</sup> with eight more bills and one joint resolution offered during the first *month* of the 93rd Congress.<sup>139</sup> House representatives introduced fifty-six bills in 1973 alone and nearly a third of the members in each house of Congress were on the record as supporting the reporter's privilege.<sup>140</sup>

Congress never passed any of those bills. It has also failed to pass recent incarnations of the shield law proposed by Senators Christopher Dodd and Richard Lugar, among others.<sup>141</sup> The recent failures are hardly surprising given the public's current lack of confidence in journalists,<sup>142</sup> but the earlier failures stand out because they occurred during widespread public support for the press and heightened interest in passing a federal shield law.<sup>143</sup> North Carolina Senator Sam Ervin, who presided over hearings on the federal shield law as chairman of the Judiciary Committee's Subcommittee on Constitutional Rights, explained this failure. First, despite its supporters' zeal, the federal shield law never had overwhelming support in Congress, particularly in the Senate Judiciary Committee, which controlled its fate.<sup>144</sup> Second, there was no consensus in Congress or in the press about what a federal privilege should look like, including the familiar dispute about who should be able claim the privilege, or what type of proposal could get through Congress.<sup>145</sup> Third, courts immediately began limiting *Branzburg's* scope, "indicat[ing] a willingness on the part of the courts to recognize the right of newsmen, under certain circumstances, to shield their sources."<sup>146</sup> Fourth, unlike in the *Branzburg*

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138. *Id.* at 256 n.92.

139. *Id.* at 261.

140. *See id.* at 261.

141. Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006); Free Flow of Information Act of 2005, S. 340, 109th Cong. (2005); Free Speech Protection Act of 2004, S. 3020, 108th Cong. (2004).

142. Carroll Doherty, *The Public Isn't Buying Press Credibility*, NIEMAN REP., Summer 2005, at 47 available at <http://www.nieman.harvard.edu/reports/05-2NRsummer/V59N2.pdf>. (noting that, while public confidence in the press was high in the 1970s, "in the late 1980's, ratings for the press began to slip, and by the 1990's the slip had become a slide.").

143. *See id.* at 47 (noting that "[f]rom the 1970s through the mid-1980s, confidence in the press was as high as it was for other major institutions" like Congress, the military, and education, and, even in 1990, "74 percent of Americans said they had a great deal or some confidence in the press."); Ervin, *supra* note 14, at 261.

144. Ervin, *supra* note 14, at 261.

145. *Id.* at 261-63 (noting that, "[t]he Ad Hoc Drafting Committee [a special Congressional committee that had been formed for this purpose] which was seeking a universally acceptable approach drafted not one, but six bills for the press to rally behind").

146. *Id.* at 273. For example, only a month after the Supreme Court decided *Branzburg*, the Eighth Circuit Court of Appeals found that a reporter did not have to reveal the confidential source of allegedly libelous statements. *Cervantes v. Time, Inc.*, 464 F.2d 986, 991-93 (8th Cir.

cases, prosecutors exercised restraint in seeking information from reporters.<sup>147</sup> Finally, the Watergate investigation absorbed both the public and Congress' attention, demonstrating that the press could do its job effectively without a shield law.<sup>148</sup>

Interestingly, Ervin never suggested that Congress might have been less motivated to pass a federal shield law because it was simultaneously considering the Federal Rules of Evidence. The Rules could protect reporters broadly, leaving the details of how to define the privilege to the courts.<sup>149</sup> The Rules are the focal point of the reporter's privilege debate today.

### *B. How Congress Re-Wrote the Privilege Rules in the Federal Rules of Evidence*

Until 1975, federal courts followed common law evidentiary rules, guided by Supreme Court precedent and treatises written by Wigmore, Thayer, and Morgan—the three great evidence scholars of the twentieth century.<sup>150</sup> These scholars did not always agree, sparking debate among the courts about which theory to follow. For example, hearsay has traditionally been defined as an out-of-court *statement* offered to prove the truth of the matter asserted, which includes oral statements, writings, and assertive conduct.<sup>151</sup> However, Professor Morgan disliked that approach. He believed that the hearsay rule should focus on the declarant's state of mind and that any words or conduct reflecting that state of mind should also be classified as hearsay.<sup>152</sup>

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1972)). The Supreme Court refused to review the case. *Cervantes v. Time, Inc.*, 409 U.S. 1125 (1973). Interestingly, the *Cervantes* court only cited *Branzburg* once, limiting its discussion of the case to a footnote in which it recognized that the First Amendment did not contain a testimonial privilege for journalists. *Cervantes*, 464 F.2d at 992 n.9. Nonetheless, the court stated that "[t]o routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." *Id.* at 993.

147. *Ervin*, *supra* note 14, at 273. The Justice Department took official action in this respect in October 1973, issuing new guidelines to federal prosecutors which were favorable to the press. *Id.* at 276 n.154.

148. *Id.* at 274 (noting that, in the wake of the Watergate investigation, Senator Cranston recognized that "[Watergate] was all done without a shield law, so why do we need one?") (quoting N.Y. TIMES, July 1, 1973, at 22)).

149. FED. R. EVID. 501

150. Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2439 (2000).

151. FED. R. EVID. 801(a)–(c).

152. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143–45

Rather than having the federal courts debate the scholars' interpretation of common law evidentiary principles, the Supreme Court stepped in, and in 1965 Chief Justice Earl Warren formed a new Advisory Committee to codify the principles into a uniform set of federal rules.<sup>153</sup> It took several years, but the Advisory Committee finally submitted the Federal Rules of Evidence to Congress for approval on February 5, 1973.<sup>154</sup>

Although it is easy today to think about the Federal Rules of Evidence in the abstract, it is important to remember that they arrived in Congress less than a year after the Supreme Court decided *Branzburg* and at the height of the Congressional effort to pass a federal shield law.<sup>155</sup> That context makes Congress' response to the Rules even more fascinating. The Advisory Committee had written Article V of the Rules to contain thirteen rules defining the scope of the evidentiary privileges that federal courts would recognize under the new Rules.<sup>156</sup> It contained nine specific privileges: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergy, political vote, trade secrets, secrets of state and other official information, and identity of informer.<sup>157</sup> Furthermore, it provided that the courts could *only* recognize those privileges specified in the Federal Rules of Evidence or another act of Congress.<sup>158</sup>

Congress balked at the specific privileges and cut them from the Federal Rules. In their place, the House Judiciary Committee drafted Rule 501 to preserve common law privileges and deferred the rule's further development to the courts "in the light of reason and experience."<sup>159</sup> The Senate Judiciary Committee agreed with the change and both houses of Congress approved Rule 501, along with the rest of the Federal Rules, in December 1974.<sup>160</sup> The President signed the bill into law on January 2, 1975.<sup>161</sup>

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(1935) (describing the Morgan or declarant-centered definition of hearsay).

153. S. REP. NO. 93-1277, at 4-5 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7051-52.

154. S. REP. NO. 93-1277, at 5 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7052.

155. See Ervin, *supra* note 14, at 260-61.

156. FED. R. EVID. 501 advisory committee's note.

157. *Id.*

158. *Id.*

159. H.R. REP. NO. 93-650, at 8 (1973), as reprinted in 1974 U.S.C.C.A.N. 7075, 7082; see also S. REP. NO. 93-1277, at 6 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7052-53 (calling the House's re-writing of Rule 501 "the most far-reaching House change in the rules."); FED. R. EVID. 501.

160. S. REP. NO. 93-1277, at 11 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051.

161. See generally Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub L. No. 93-595, 88 Stat. 1926 (1975).

Several scholars have noted that, in re-writing Article V, Congress “display[ed] rare interest in the proposed rules and the rule-making process.”<sup>162</sup> Congress disliked the proposed rules for a number of reasons, including the fact that they “narrowed some common-law privileges and omitted others, such as the physician-patient, spousal communications, and journalistic privileges.”<sup>163</sup> However, even after the re-writing, doubt lingered as to how broadly the courts could construe Rule 501’s delegation of authority. On the one hand, a plain reading of the rule appears to give any federal court (“the *courts* of the United States”) authority to deny privileges or declare new privileges, unless the Constitution, an act of Congress, or a Supreme Court rule dictates otherwise.<sup>164</sup> On the other hand, when Congress amended the Rules Enabling Act in 1988, it exempted privileges from the process, stating that “[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect *unless* approved by an Act of Congress.”<sup>165</sup> For years, the Supreme Court also seemed confused. At times, the Court interpreted Rule 501 broadly as a direction to the federal courts to “continue the evolutionary development of testimonial privileges . . . .”<sup>166</sup> However, the Court also said it was “disinclined to exercise this authority expansively.”<sup>167</sup>

This confusion appeared to end in 1996 when the Court decided *Jaffee v. Redmond*. In *Jaffee*, a police officer, responding to a “fight in progress” call at an apartment building outside Chicago, shot and killed a man who she thought was about to stab someone.<sup>168</sup> The victim’s estate sued the officer in federal court, alleging that she had violated the victim’s Fourth Amendment rights by using excessive force during the incident.<sup>169</sup> During discovery, and after the victim’s estate learned that the officer had participated in about fifty counseling sessions with a clinical social worker, the estate asked for the social worker’s notes for use in cross-examining the

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162. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 88 (2002).

163. *Id.*

164. See FED. R. EVID. 501 (noting the privileges shall be governed by the common law as interpreted by the courts).

165. 28 U.S.C. § 2074 (1988) (emphasis added).

166. *Trammel v. United States*, 445 U.S. 40, 47 (1980); see also *United States v. Weber Aircraft*, 465 U.S. 792, 803–04 n.25 (1984) (“Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than to attempt to codify them.”).

167. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (rejecting the University’s proposed privilege for confidential, academic peer review documents).

168. *Jaffee v. Redmond*, 518 U.S. 1, 4 (1996).

169. *Id.* at 5 (arguing that the officer had drawn her gun before exiting her squad car and that the victim was unarmed when he exited the apartment building, contrary to what the officer said).

officer.<sup>170</sup> Both the officer and the social worker refused to answer questions about the sessions and the social worker even refused to turn over her notes, arguing that they were protected under the psychotherapist-patient privilege.<sup>171</sup> In response, the trial judge concluded that this refusal lacked "legal justification" and allowed the jury to presume that the contents of the notes were unfavorable to the officer.<sup>172</sup> The jury awarded the victim's estate over \$500,000 in total damages, but the Seventh Circuit reversed the judgment finding that the trial court should have recognized the psychotherapist-patient privilege under Rule 501's flexible mandate.<sup>173</sup>

In an opinion by Justice Stevens, the Court affirmed the Seventh Circuit's decision and identified three factors for federal courts to consider when deciding whether to create a new testimonial privilege under Rule 501: (1) whether the privilege "promotes sufficiently important [public and private] interests,"<sup>174</sup> (2) whether the evidentiary benefit that would result from denying the privilege would be modest or significant,<sup>175</sup> and (3) whether the states have provided similar protections.<sup>176</sup> Under this third prong, the Court found that the inclusion of the psychotherapist privilege in the original Article V by the Advisory Committee on the Federal Rules "reinforced" the uniform judgment of the states to recognize this privilege.<sup>177</sup> As the Court noted, "the Senate Judiciary Committee explicitly stated that its action 'should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules.'"<sup>178</sup>

After *Jaffee*, one might have expected journalists to run to federal court claiming a reporter's privilege under Rule 501. However, as the next section will explain, that did not happen.

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170. *Id.*

171. *Id.*

172. *Id.* at 5-6.

173. *Id.* at 6.

174. *Jaffee*, 518 U.S. at 9-11.

175. *Id.* at 11.

176. *See id.* at 12-14. The Court did not articulate *how many* states must provide similar protections in order for this factor to be persuasive, although in that case all 50 states plus the District of Columbia had recognized a psychotherapist-patient privilege and the Court stressed the "uniform judgment" of the States. *See id.*

177. *Id.* at 14.

178. *Id.* at 15 (quoting S. REP. NO. 93-1277, at 13 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7059) (omission and alterations in original).

#### IV. DELAYED REACTION: ANALYZING JOURNALISTS' RULE 501 CLAIM UNDER *JAFFEE*

The Supreme Court decided *Jaffee* on June 13, 1996. We might assume that Floyd Abrams<sup>179</sup> was in his office the next morning working on a way to frame a reporter's privilege argument under Rule 501, but that did not happen. In fact, although journalists challenged a number of subpoenas in 1996, they never raised the Rule 501 argument or even mentioned *Jaffee*.<sup>180</sup> Why? The most likely explanation is that journalists had convinced so many federal courts to limit *Branzburg* that *Jaffee* seemed irrelevant at the time, or at least superfluous.<sup>181</sup> For instance, as noted earlier, in one major case the Idaho Supreme Court interpreted *Branzburg* in the "now widely accepted view . . . that [*Branzburg*] was limited by the specific facts presented by the consolidated cases, and that a case-by-case analysis must be used in 'balancing freedom of the press against a compelling and overriding public interest in the information sought.'"<sup>182</sup>

But everything changed when the issue reached Seventh Circuit Judge Richard Posner. In *McKevitt v. Pallasch*, several journalists challenged an order requiring them to turn over tapes of their conversations with a witness in the Irish prosecution of an alleged IRA terrorist.<sup>183</sup> The Seventh Circuit refused to stay the district court's order.<sup>184</sup> Seizing on the journalists' argument, Judge Posner—perhaps the most famous circuit judge in the United States—then wrote a brief opinion explaining why the court had refused to stay the order, attacking the journalists' argument and expressing surprise at the number of courts that had recognized a reporter's

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179. Abrams represented *The New York Times* in the Pentagon Papers Case and has been called the "most significant First Amendment lawyer of our age." See generally Biography of Floyd Abrams, <http://www.cahill.com/attorneys/data/201> (last visited Feb. 15, 2007).

180. See, e.g., *In re Grand Jury Subpoena ABC, Inc.*, 947 F. Supp. 1314 (E.D.Ark. 1996); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1 (D.D.C. 1996). Interestingly, although reporters have only recently increased their reliance on this argument, the Third Circuit used Rule 501 in 1979 to recognize a qualified, common law reporter's privilege in a civil case. *Riley*, 612 F.2d at 714–15. It extended the privilege to grand jury settings in 1991. See *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 367 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992).

181. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1211, 1213 (M.D.N.C. 1996) (reading *Branzburg* as helping to develop a journalistic privilege and noting that the privilege had been recognized by "most" federal circuits).

182. *In re Contempt of Wright*, 700 P.2d 40, 43 (Idaho 1985) (quoting *Zelenka v. State*, 266 N.W. 2d 279, 287 (Wis. 1978)).

183. *McKevitt v. Pallasch*, 339 F.3d 530, 531 (7th Cir. 2003).

184. *Id.*



privilege after *Branzburg*.<sup>185</sup> Although Posner did not discount the importance of maintaining confidentiality in the newsgathering process, he insisted that the privilege would never be absolute and would yield to law enforcement needs in most circumstances.<sup>186</sup>

Posner's opinion triggered a shift in the reporter privilege cases.<sup>187</sup> Most importantly, prosecutors felt empowered by the decision and forced judges to re-evaluate *Branzburg*.<sup>188</sup> Thus, while courts retained some flexibility (especially in civil cases) after *McKevitt*, they consistently rejected broad, First Amendment-based, reporter privilege claims in the grand jury context.<sup>189</sup> Searching for a way to distinguish *Branzburg*, journalists quickly settled on Rule 501,<sup>190</sup> and it has largely displaced the First Amendment argument reporters relied on for decades. For example, in their motion challenging the BALCO subpoenas, *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams devoted thirteen pages to the Rule 501 argument, while spending only five pages arguing that the material was protected by the First Amendment.<sup>191</sup>

#### A. *The Specifics of the Rule 501 Argument.*

As with many things born quickly out of necessity, the Rule 501/*Jaffee* argument made by reporters has a number of flaws. Before getting into that criticism, however, we must focus on the details of the

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185. *Id.* at 532.

186. *See id.*

187. *See* Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists?*, THE NEW YORKER, Jan. 16, 2006, at 31.

188. *See id.* at 32 ("According to [Lucy] Dalglish, of the Reporters Committee for Freedom of the Press, 'Prosecutors and civil litigants who want reporters to testify have really felt empowered, largely, I think, because of Judge Posner. He said, 'Everybody go back and reread this case. Branzburg is just not there as a decision that helps the press.'").

189. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 44–46 (1st Cir. 2004) (stating that, even in situations distinct from *Branzburg*, disclosure of a reporter's confidential sources did not offend the First Amendment and could be compelled if directly relevant to a good-faith or non-frivolous claim, and as long as the information is not readily available elsewhere).

190. This was not the only way journalists tried to distinguish *Branzburg*. In addition, they have claimed that *Branzburg* should be limited to cases in which a journalist actually witnesses criminal activity. *See, e.g., In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 12 (D.D.C. 1996) ("In support of this argument the journalists contend that the vast majority of courts . . . have read *Branzburg* as merely holding that [only] reporters who witness a crime may be compelled to testify before a grand jury." (alteration and omission in original) (additional quotation marks omitted)).

191. *See* Memorandum of Points & Authorities in Support of Motion to Quash Subpoenas by Mark Fainaru-Wada & Lance Williams at 18–36, *In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, No. 06-90225 (N.D. Cal. May 31, 2006) [*hereinafter* Fainaru-Wada Memo].

argument itself.<sup>192</sup>

The Rule 501 argument made by reporters today is based exclusively on *Jaffee* and the three-pronged test announced by Justice Stevens in that decision. First, the journalists argue that the reporter's privilege serves important public and private interests.<sup>193</sup> On a practical level, shielding reporters from subpoenas and imprisonment protects the public's right to know, a principle widely recognized as the core of the First Amendment.<sup>194</sup> On a theoretical level, the reporter's privilege serves "society's interest in protecting the integrity of the newsgathering process" and the news media institution itself.<sup>195</sup> Second, these important interests outweigh the minimal evidentiary costs likely to result from protecting journalists' confidential information. As in *Jaffee*, rejecting the privilege will chill conversations between reporters and their confidential sources that prosecutors and other litigants crave.<sup>196</sup> Thus "[t]his unspoken 'evidence' will . . . serve no greater truth-seeking function than if it had been spoken and privileged."<sup>197</sup> Finally, "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege."<sup>198</sup> The near-unanimous judgment of the States to recognize some form of a reporter's privilege compels this recognition in light of reason and experience.<sup>199</sup> In agreement, the Justice Department has directed federal prosecutors to respect journalists' promises of confidentiality by only seeking such information

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192. The following description is derived from the argument made by Fainaru-Wada and Williams in their motion to quash the government's subpoenas. *See id.* at 21–28.

193. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring) ("The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.").

194. *See Bursey v. United States*, 466 F.2d 1059, 1084 (9th Cir. 1972) ("The larger purpose [of the First Amendment] was to protect public access to information."); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices."); *Riley*, 612 F.2d at 714 ("A journalist's inability to protect the confidentiality of sources . . . will seriously erode the essential role played by the press in the dissemination of information . . . to the public."); *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) ("A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news. The threat of a newsman being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." (additional quotation marks omitted)); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) ("It is axiomatic that the First Amendment guarantee of freedom of the press is for the benefit of all the people and not a device to give the press a favored status in society.").

195. *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

196. *See Fainaru-Wada Memo*, *supra* note 189, at 20.

197. *See id.* at 22 (quoting *Jaffee*, 518 U.S. at 12).

198. *Jaffee*, 518 U.S. at 12–13.

199. *See Fainaru-Wada Memo*, *supra* note 189, at 23 nn.5–6 (listing the forty-nine states that recognize some form of privilege).

from them after reasonably attempting to obtain the same information elsewhere.<sup>200</sup>

The argument has facial appeal and several federal judges—including two circuit judges—have approved of its reasoning. In the well-publicized Judith Miller case, Judge David Tatel of the D.C. Circuit considered Congress' re-writing of Rule 501 dispositive in light of *Jaffee*.<sup>201</sup> Tatel noted that the *Branzburg* court directed Congress to determine whether such a privilege was necessary and to “fashion standards and rules as narrow or broad as deemed necessary.”<sup>202</sup> In Judge Tatel's eyes, Congress' delegation of authority to the court for creating new privileges satisfied this directive.<sup>203</sup> Judge Robert Sack agreed with Judge Tatel when he dissented from the Second Circuit's decision in *New York Times Co. v. Gonzales*.<sup>204</sup> There, the federal government sought the phone records of two journalists who reported its plans to freeze the assets of and search two foundations suspected of raising money for terrorist organizations.<sup>205</sup> The Second Circuit told the *Times* that it had to turn over the records.<sup>206</sup> Judge Sack disagreed with that decision, viewing the reporter's privilege as “an integral part . . . of the American democratic process” that easily met the *Jaffee* test.<sup>207</sup> Such a privilege surely would include the reporter's phone records.<sup>208</sup>

### B. Critiquing the Reporters' Rule 501 Argument

These rather conclusory analyses hide the flaws in the journalists' argument. First, it fails to explain *how* the balance of interests tilts so sharply in the journalists' favor. Furthermore, the journalists do not

200. See 28 C.F.R. § 50.10 (2006). The Justice Department's guidelines also stress that prosecutors should have reasonable grounds to believe, based on information obtained from other sources, that the information sought from a journalist is essential to the government's case and not merely peripheral or speculative. See *id.* § 50.10(f)(1)–(2).

201. See *In re Grand Jury Subpoena, Miller*, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring).

202. See *id.* (quoting *Branzburg*, 408 U.S. at 706).

203. *Id.*

204. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) [hereinafter *Gonzales II*], *rev'g*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005) [hereinafter *Gonzales I*].

205. *Gonzales II*, 459 F.3d at 162.

206. *Id.* at 163 (holding that “no First Amendment protection is available to the *Times*”). The *Gonzales* case will continue to develop over the next few months. On November 24, the *Times* asked Supreme Court Justice Ruth Bader Ginsburg to stay the Second Circuit's mandate until December 24, when it will file a petition for *certiorari* with the high court. Adam Liptak, *Times Seeks to Bar Review of Phone Data*, N.Y. TIMES, Nov. 25, 2006, at A12.

207. *Gonzales II*, 459 F.3d at 181 (Sack, J., dissenting).

208. See *id.* at 179.

appreciate the differences between the psychotherapist-patient privilege recognized in *Jaffee* and the reporter's privilege. While those differences may seem trivial, they could be dispositive when the Supreme Court rules on the issue.

The most obvious flaw in the Rule 501 argument is that it directly contradicts *Branzburg*, which is still good law after thirty-five years.<sup>209</sup> While the Federal Rules of Evidence might have given courts the *authority* to develop new privileges, Congress could not have intended to wipe out 170 years of Supreme Court precedent and rebuild the law of privileges with a blank slate. In this sense, by transferring the development of privileges to the courts, Congress increased the relevance of the *Branzburg* decision. Judge Jeffrey White, who presided over the BALCO case, echoed this reasoning when he refused to "[s]anction the creation of privileges by federal courts in contradiction of the Supreme Court's mandate."<sup>210</sup> Judge White determined that the Ninth Circuit's position on the issue was clear: "[U]nless and until the Supreme Court *states* that a common law reporter's privilege exists, or unless Congress *enacts* such a privilege, *Branzburg's* mandate is binding."<sup>211</sup>

Second, the reporters fail to explain how the balance of interests tilts so heavily in their favor. As suggested earlier in this Comment, weighing the First Amendment freedom of journalists against the Fifth Amendment rights of criminal defendants, and society's interest in enforcing its laws, might be the most difficult constitutional analysis judges have to perform. It is surprising, then, that the journalists' argument in the BALCO case takes up all of *two* paragraphs.<sup>212</sup> In those two paragraphs, the reporters simply insist that the important interests the privilege serves outweigh the evidentiary costs. In support, they quote a paragraph from *Jaffee* that explains how the therapist-patient relationship would be chilled if their conversations were not generally protected.<sup>213</sup> But, can we so readily equate the reporter-source relationship with that of the therapist and patient?

The therapist-patient conversation covers matters that are inherently

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209. See *Branzburg*, 408 U.S. at 706 (noting that judges should not create new privileges because doing so is ostensibly a function of the legislature).

210. *In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111, 1119 (N.D. Cal. 2006) (quoting *Scarce*, 5 F.3d at 403 n.3) [hereinafter *Fainaru-Wada*].

211. *Id.* (emphasis added). For good measure, the *Fainaru-Wada* court proceeded to declare that, even if a reporter's privilege existed, it would have been overcome in this case because the government exhausted all reasonable alternatives to discover the source of the leaked testimony. See *id.* at 1120.

212. See *Fainaru-Wada Memo*, *supra* note 189, at 20.

213. See *id.* at 22.

private and intended to help the patient recover from mental instability or anguish.<sup>214</sup> The reporter-source conversation, on the other hand, is inherently public; indeed, the source that requests anonymity does so because he or she knows that the conversation will be divulged to millions of people. Similarly, as some commentators have pointed out, the chilling effect that will ensue from not protecting reporter-source conversations is likely much smaller and more insignificant than the chilling effect in the therapist-patient context.<sup>215</sup> *Washington Post* reporter Walter Pincus wrote one of the first articles identifying Wen Ho Lee as the Los Alamos scientist suspected of giving nuclear secrets to the Chinese government. Pincus recently said that the subpoenas to journalists did not have a chilling effect on his investigative work, saying, "My sources are not drying up."<sup>216</sup> Anyone who reads their local newspaper would agree: a quick glance at a recent Sunday edition of the *Los Angeles Times* revealed two major stories that depended almost exclusively on anonymous sources.<sup>217</sup>

The journalists' argument also fails to appreciate some of the subtleties in the *Jaffee* case that distinguish the psychotherapist privilege from the reporter privilege, and could lead the Supreme Court to a different result than it reached in 1996. Most importantly, the psychotherapist privilege was not "new": the Advisory Committee had included it as one of the nine specific privileges in the original Article V.<sup>218</sup> The *Jaffee* majority found that fact very important and used it to distinguish *Jaffee* from *United States v. Gillock*.<sup>219</sup> There, the Court held that Rule 501 did not include a state legislative privilege because, in part, the Advisory Committee had not included one in its draft.<sup>220</sup> Of course, the Advisory Committee did not include a reporter's privilege in its draft of the Federal Rules.<sup>221</sup> Moreover, although Congress held hearings and considered over fifty bills, it never passed a federal shield law for reporters, suggesting that

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214. See *Jaffee*, 518 U.S. at 10. The *Jaffee* court gave these considerations great weight when it recognized the psychotherapist privilege, saying that "because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace." *Id.*

215. See Toobin, *supra* note 185, at 30.

216. See *id.*

217. See Meg James, *NBC Universal to End CEO's 21-Year Reign*, L.A. TIMES, Feb. 4, 2007, at A1 (predicting executive Jeff Zucker's elevation to CEO according to several anonymous sources); Noam Levey, *Bush Reaches Across Partisan Divide*, L.A. TIMES, Feb. 4, 2007, at A16 (using several anonymous sources to disclose the details of a private question-and-answer session between President Bush and congressional Democrats).

218. FED. R. EVID. 501 advisory committee's note.

219. *Jaffee*, 518 U.S. at 14–15.

220. *Gillock*, 445 U.S. at 367–68.

221. FED. R. EVID. 501 advisory committee's note.

Congress did not want to protect journalists from compelled disclosure of their confidential sources.<sup>222</sup> *Jaffee* also presented a unique factual scenario where the person seeking disclosure had sued a *police officer* for damages.<sup>223</sup> The Justices might be less-inclined to protect reporter-source conversations that frustrate law enforcement objectives and jeopardize the constitutional rights of criminal defendants, particularly after they contrast the relative sensitivity of the two relationships. The Court's membership has also changed since 1996. We can expect Justice Scalia to vote against recognizing a reporter's privilege (just as he opposed recognizing the psychotherapist's privilege in *Jaffee*).<sup>224</sup> However, Justice Breyer, who joined the *Jaffee* majority, is widely considered to be a First Amendment pragmatist—someone “who will vote for or against a claim of free expression depending upon the specifics of a case and the real world effect of allowing such freedom.”<sup>225</sup> Given the potential real world effects of recognizing the reporter's privilege,<sup>226</sup> we can hardly consider him a safe vote in support of the privilege. While it was unclear from his confirmation hearings, journalists themselves have questioned the

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222. See Ervin, *supra* note 14, at 274 (describing how, after Congress failed to pass any of the bills in the immediate wake of *Branzburg*, members lost interest in pursuing a press privilege through legislation).

223. *Jaffee*, 518 U.S. at 4–5.

224. We can expect Justice Scalia to vote against recognizing a reporter's privilege based on Rule 501 because he has pledged to uphold the “traditional judicial preference for the truth” and opposed privileges that “[are] new, vast, and ill defined.” *Jaffee*, 518 U.S. at 19–20 (Scalia, J., dissenting). The reporter's privilege clearly meets that standard and Justice Scalia would probably find it even less defined than the psychotherapist's privilege, given how difficult it is to define a “journalist.” See generally Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1376–77 (2003) (discussing, for example, the difficulty in defining the reporter's privilege).

225. Lyle Denniston, *Once Again No First Amendment Champion*, AM. JOURNALISM REV., Oct. 1994, at 70; see also Murad Hussain, *The “Bong” Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens*, 116 YALE L.J. POCKET PART 292 (2007), available at <http://thepocketpart.org/2007/3/9/hussain.html> (discussing Justice Breyer's First Amendment pragmatism in the context of expression by students at school-sponsored functions). Justice Breyer demonstrated this pragmatism with respect to press freedom in 2001, when he concurred in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). There, the Supreme Court struck down state and federal statutes that punished news organizations for publishing information that had been obtained (entirely by third parties) through illegal interception of cellular phone messages. *Id.* at 514–16. But in a concurring opinion joined by Justice O'Connor, Justice Breyer emphasized the competing interests in the case and stated that, when a statute chills speech in order to protect another constitutional right (i.e. the right to privacy in *Bartnicki*), the Constitution merely “demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with [the competing right].” *Id.* at 537–38 (2001) (Breyer, J., concurring).

226. See *Jaffee*, 518 U.S. at 18–19 (Scalia, J., dissenting) (“[O]ccasional injustice . . . is the cost of every rule which excludes reliable and probative evidence.”).

likelihood that Chief Justice Roberts will support them.<sup>227</sup> Indeed, of all the justices, only Justice Kennedy has a record on the Court that clearly suggests he would side with reporters in this battle.<sup>228</sup>

Even if the reporter's privilege could be easily compared to the psychotherapist's privilege, the reporter's privilege offers a greater possibility of abuse that could more directly compromise society's interest in effective law enforcement. For example, when defense lawyer Troy Ellerman leaked the secret grand jury testimony of Barry Bonds and other famous athletes to *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams in the BALCO case, a colleague stated that Ellerman intended to "derail the criminal case by stirring up publicity that he could then use to seek dismissal of the charges against his client," BALCO Vice President James Valente.<sup>229</sup> When the colleague expressed concern, "Troy said not to worry . . . . 'He said the reporters had vowed to go to prison before they would reveal their source.'"<sup>230</sup> That admission should buttress

227. Press Release, Reporter's Committee for Freedom of the Press, Roberts' Record on Free Press Issues (July 21, 2005), available at <http://www.rcfp.org/news/documents/2005/0721-robertsrec.html> (noting the difficulty in determining the Chief Justice's thoughts on the free press issues because he did most of his relevant First Amendment work as an attorney for specific clients; his "collected works leave cause for concern among free press advocates").

228. See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2002* (2002) (unpublished update of Professor Volokh's 2000 article, *How the Justices Voted in Free Speech Cases*, 48 UCLA L. REV. 1191 (2000), on file with the author), available at <http://www.law.ucla.edu/volokh/howvoted.htm> (noting that, since Justice Breyer joined the Court in 1994, Justice Kennedy has voted with the speaker in free speech cases seventy-five percent of the time, while the other five active justices' records were more mixed, supporting the speaker only fifty to sixty percent of the time). Even the justices who have consistently supported *press* interests have suggested that "there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another." See *Bartnicki*, 532 U.S. at 530 (majority opinion of Justice Stevens, joined by Justices Kennedy, Souter, and Ginsburg). Given the historical record, the strong *Branzburg* precedent still on the books, and the strength of the competing government interests, those justices might find the alleged chilling effect on journalists insufficient to outweigh the government's interest in effective law enforcement.

229. Bob Egelko & John Koopman, *Lawyer Enters Guilty Plea as BALCO Leaker*, S.F. CHRONICLE, Feb. 16, 2007, at A1. In fact, Ellerman did attempt to use the publicity to help his client. In October 2004, he filed a motion to dismiss the charges against Valente, arguing that "repeated government leaks of confidential information to the media [made] a fair trial practically impossible anywhere in the country." Press Release, U.S. Department of Justice, Attorney Involved in BALCO Case Admits Leaking Grand Jury Transcripts in Steroid Case to San Francisco Chronicle (Feb. 14, 2007), available at [http://www.nynpa.com/download.cfm/2\\_15\\_07.pdf?AssetID=635](http://www.nynpa.com/download.cfm/2_15_07.pdf?AssetID=635). The district court denied the motion, *United States v. Conte*, No. CR 04-0044 SI (N.D. Cal. Dec. 28, 2004) (order denying motions to dismiss, quash search warrants, and suppress evidence), and the government is now using it as the basis of a felony obstruction-of-justice charge against Ellerman. Egelko & Koopman, *supra*.

230. *Id.*, final edition available at 2007 WL 3050118.

the worst fears of journalists. Should the Supreme Court expand protection for journalists if members of the Bar, who have sworn to act ethically and with candor toward the court, nonetheless use the confidentiality provided by reporters to undermine the judicial process?

Finally, we cannot discount the difficulties in defining a reporter's privilege and the effect that might have on the Supreme Court's willingness to recognize it. In the Judith Miller case, Judge David Sentelle counseled against recognizing the privilege for this very reason.<sup>231</sup> Who should qualify for the privilege?<sup>232</sup> Should it be absolute or qualified? Should it only apply in civil cases or criminal cases as well? As Judge Sentelle argued, "[t]he variety of legislative choices among the states only serves to heighten the concern expressed by the majority in *Branzburg*"<sup>233</sup> and would convince many courts that any federal reporter's privilege be recognized by Congress, not the judiciary.

### C. Using an Originalist's Lens to Improve the Rule 501 Argument

As this criticism demonstrates, journalists cannot simply piggyback on *Jaffee* and hope that the Supreme Court feels bound to extend Rule 501's protection to reporters. The privilege is too broad, implicates too many competing policy interests (including some grounded in the Constitution itself), and would protect a profession too indefinable to merit such a cursory review. Rather than ignore the competing policy interests, journalists must use these interests to strengthen their argument. They can use Rule 501 and *Jaffee* to organize their case, but they must focus on the First Amendment and use the Framers' experience to demonstrate how critical a reporter's privilege is to American society.

Simply recounting Zenger's trial and reciting the First Amendment will not suffice—the journalists must use the First Amendment as a framing mechanism. By revisiting the Framers' experience with compelled disclosure, journalists can achieve three goals. First, they can distinguish *Branzburg*. Second, they can explore other ways the administration of

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231. *Miller*, 397 F.3d at 979–81 (Sentelle, J., concurring).

232. The difficulty in determining who should be allowed to invoke the reporter's privilege has spawned dozens of articles in recent years, most focusing on whether the privilege should encompass bloggers and Internet journalists who do not work for an official news-gathering organization. This article does not attempt to cover that issue in any depth. For more information, see Berger, *supra* note 222. For a different view, arguing that bloggers generally should not be protected under the privilege, see Rebecca Blood, *Weblogs and Journalism: Do They Connect?*, NIEMAN REP., Fall 2003, at 61–62 ("[T]he vast majority of Weblogs do not provide original reporting—for me, the heart of all journalism.").

233. *Miller*, 397 F.3d at 981 (Sentelle, J., concurring).



justice will be hampered by not recognizing the privilege. Finally, by emphasizing how important the Framers found confidentiality in exercising the freedom of the press, and by framing their case as a battle of constitutional interests, journalists stand a better chance of convincing the Court to recognize a qualified privilege as a compromise.

### 1. How an Originalist Approach Helps Distinguish *Branzburg*

For all the litigation and scholarship that has ensued, it is surprising that more people have not called for overruling *Branzburg*. After all, the *Branzburg* court trivialized both the journalists' interest in protecting a source's confidentiality and the source's underlying interest in anonymity. In essence, those individuals who spoke with the press assumed the risk of having their identity revealed in a criminal investigation.<sup>234</sup> That characterization seems mistaken and outdated after Watergate, Iran Contra, and other high-profile cases where whistleblowers relied on the cloud of anonymity to reveal government and corporate wrongdoing. Nonetheless, the Supreme Court has never questioned the case and, just last year, it refused to hear the Miller case.<sup>235</sup> *Branzburg* proves an obstacle in any attempt to secure a reporter's privilege.

*Branzburg* also remains one of the most misunderstood cases in the history of the Supreme Court. For example, courts have characterized Justice White's opinion as both a plurality and a majority opinion.<sup>236</sup> This has led courts to differ in their interpretation of Justice Powell's concurrence: should we read it narrowly, to fit with Justice White's view that reporters have to reveal confidential information to a grand jury unless the investigation is conducted in bad faith?<sup>237</sup> Or should we read it more broadly to apply a balancing test in every situation?<sup>238</sup>

234. See *Branzburg*, 408 U.S. at 693–95 (“Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative . . . . Accepting . . . that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification . . . we cannot accept the argument that the public interest in possible future news . . . must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants.”).

235. *Miller v. United States*, 545 U.S. 1150 (2005).

236. Compare *United States v. Smith*, 135 F.3d 963, 968–69 (5th Cir. 1998) (“Although the opinion of the *Branzburg* Court was joined by five justices, one of those five, Justice Powell, added a brief concurrence. For this reason, we have previously construed *Branzburg* as a plurality opinion.”), with *Scarce*, 5 F.3d at 400 (“It is important to note that Justice White’s opinion is *not* a plurality opinion.” (emphasis in original)).

237. See *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401 (9th Cir. 1993) (adopting this view).

238. See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988)

Using an originalist approach will allow journalists to point out the inconsistencies in the *Branzburg* majority opinion. For instance, the *Branzburg* majority emphatically stated, "the First Amendment does not invalidate every incidental burdening of the press . . . otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed."<sup>239</sup> Because forcing a journalist to reveal his or her confidential sources did not implicate traditional constitutional doctrines like prior restraint or compelled speech, the Court found no problem with the disclosure requirement.<sup>240</sup> In this respect, the Court paid no attention to the historical record, which clearly indicated that the Framers intended to protect the press from government investigations, especially when reporters published articles confidentially or obtained information through confidential sources.<sup>241</sup> The Court disregarded the effect Zenger's trial had on the Framers, who placed the freedom of the press in the First Amendment because of how critical the freedoms it encompassed (religion, speech, press, petition) were to the American republic. If the Framers did not intend to protect such journalistic freedom, how could the *Branzburg* majority explain the Second Continental Congress' decision not to force the editor of the *Pennsylvania Packet* to reveal the anonymous author of articles that might have libeled some members of Congress, because to do so would have offended the freedom of the press?<sup>242</sup>

Of course, this does not suggest that the Framers would *never* have ceded the freedom of the press to other constitutional interests, especially the criminal defendant's due process rights and the grand jury function of the Fifth Amendment. But it requires a great set of historical blinders to interpret the First Amendment as providing journalists with *no* right to protect the confidentiality of their sources. This is where Justice Powell's concurrence comes into play. If journalists can successfully emphasize the *Branzburg* majority's error in discerning the original intent of the First Amendment's drafters, they can invoke Powell's concurrence as striking the proper balance. Justice Powell correctly recognized that "the courts will be available to newsmen under circumstances where *legitimate* First

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(adopting this latter view by balancing the "legitimate" First Amendment concerns of the news organization against the defendants' interests).

239. *Branzburg*, 408 U.S. at 682–83.

240. See *Branzburg*, 408 U.S. at 681.

241. See, e.g., *McIntyre*, 514 U.S. at 361–62 (Thomas, J., concurring) (describing the Benjamin Rush example discussed earlier in this Comment).

242. See *id.*

Amendment interests require protection."<sup>243</sup> Under Powell's approach, those interests generally include the journalist's right to protect his or her confidential sources, although that interest can be overcome by society's interest in effective law enforcement.<sup>244</sup> Indeed, balancing these competing interests on the case-by-case basis suggested by Justice Powell, with an emphasis on protecting the freedom of the press unless absolutely necessary,<sup>245</sup> seems to best reflect the spirit of the Framers when they drafted the Bill of Rights.

This does not require overruling *Branzburg*. Rather, by using this approach, journalists can distinguish the case and clarify the important yet limited principle Justice Powell himself recognized that it stands for: the First Amendment does not *always* immunize reporters *completely* from testifying before a grand jury.

## 2. How an Originalist Approach Helps Emphasize the Social Consequences of Not Recognizing the Reporter's Privilege

Earlier, this Comment criticized the way journalists have characterized the consequences of not recognizing the reporter's privilege. For example, in the BALCO case, reporters Fainaru-Wada and Williams devoted all of two paragraphs to the discussion, one of which simply quoted a passage from the *Jaffee* opinion.<sup>246</sup> Since testimonial privileges impede the search for truth and thus are not created lightly,<sup>247</sup> this discussion deserves more attention. Journalists will only succeed when they convince the Supreme Court that it *must* recognize the reporter's privilege as "a public good transcending the normally predominate principle of utilizing all rational means for ascertaining truth."<sup>248</sup>

To accomplish that goal, journalists need to do more than assert their role as the "Fourth Estate," watchdog of government.<sup>249</sup> The press serves

243. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (emphasis added).

244. *Id.*

245. We must be careful to distinguish how emphasizing the freedom of the press in such a balancing test would differ from the balancing test proposed in Justice Stewart's *Branzburg* dissent. As Justice Powell noted, Stewart would have placed a heavy burden on the government to force a journalist to testify. Compare *Branzburg*, 408 U.S. at 739 (Stewart, J., dissenting) ("The established method of 'carefully' circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired."), with *id.* at 709-10 (Powell, J. concurring) (stating that placing such a heavy burden on the State would defeat a fair balancing of interests but committing to balancing the interests in general).

246. See Fainaru-Wada Memo, *supra* note 189, at 21-22.

247. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

248. *Id.* at 710, n.18.

249. The description of the press as the Fourth Estate has been traced back to Thomas

many other roles in modern America: it is at once a public servant, corporate enterprise, and piece of entertainment (as anyone who has read the gossip columns can attest). That makes the Fourth Estate argument fall on deaf ears in certain cases. What great public service, for example, did Marie Torre serve when she wrote that Judy Garland's problem was that she felt terribly fat?<sup>250</sup> For that matter, what public service did Fainaru-Wada and Williams provide when they reported about the athletes who had suspicious ties to BALCO?

Even in the BALCO case, which many argue provided a service by alerting the public to the effects of steroid abuse,<sup>251</sup> journalists cannot simply rest on their Fourth Estate laurels to win an evidentiary privilege in federal court. To their credit, journalists have touted the chilling effect compelled disclosure has on the free dissemination of news to the American public.<sup>252</sup> Confidential sources have revealed some of the most important news stories published in the last century—including the *Washington Post's* Watergate investigation, fueled by an anonymous source at the F.B.I.<sup>253</sup> Those sources might have stayed silent if they could not have remained confidential.<sup>254</sup> But even that argument might fail to convince a skeptical court constrained by *Branzburg*, which correctly predicted that the use of confidential sources—and the source's willingness

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Carlyle, who coined the term in the mid nineteenth century. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 392 (1841).

250. See Bates, *supra* note 44, at 2.

251. For example, at a private reception during the 2005 White House Correspondents' Association Dinner, President Bush told the Chronicle reporters that they had "done a service" with their BALCO reporting.

Joe Mozingo, *Expose a Scandal, Face a Prison Term*, L.A. TIMES, Nov. 14, 2006, at A1.

252. See *Branzburg*, 408 U.S. at 693 ("The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter."); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 84 (Yale Univ. Press 1975) ("Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news-source.").

253. In 2005, *Washington Post* reporter Bob Woodward identified W. Mark Felt, former associate director of the F.B.I., as "Deep Throat," the mysterious source behind the *Post's* Pulitzer Prize-winning Watergate investigation. David von Drehle, *FBI's No. 2 Was 'Deep Throat'*, WASH. POST, June 1, 2005, at A1.

254. For example, *Washington Post* reporters Bob Woodward and Carl Bernstein dedicated *All the President's Men*, their Pulitzer Prize-winning book about the Watergate scandal, "[t]o the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the *Washington Post*." CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* dedication (1974).

to talk—would not wane in its wake.<sup>255</sup>

Instead, journalists must also focus on how refusing to recognize a reporter's privilege will hamper law enforcement and the public's search for truth. To do so, they should emphasize the ways in which the First Amendment works to guarantee other liberties protected in the Bill of Rights. For example, consider the following hypothetical situation in which reading the First Amendment to protect the confidentiality of sources actually promotes the criminal defendant's due process rights. Suppose the government wrongfully accuses individual A of robbing B. A looks like C, who actually committed the crime. C's girlfriend, knowing that C committed the crime, tells a reporter that C really robbed B and the reporter writes this in the local newspaper. This leads the government to arrest C and search C's apartment,<sup>256</sup> where officers find evidence of the robbery leading to A's exoneration. In this way, the reporter's privilege, which encourages individuals to give such information to a journalist without fear of disclosure, has actually enhanced A's due process rights under the Fifth Amendment.

Next consider how the following situation enhances the pursuit of justice and the uncovering of otherwise "secret" evidence. Karen, a worker at a nuclear power plant and leader of her local labor union, begins gathering evidence that the plant has failed to keep the premises safe for workers. In particular, the evidence shows that the plant had a role in several unexplained incidents where workers were exposed to plutonium. Less than a week later, she is killed in a mysterious car accident. Everybody suspects foul play but prosecutors do not file any criminal charges. Art, a filmmaker in Los Angeles and former newspaper reporter, reads about the incident and is intrigued. He decides to make a documentary about Karen's death and starts contacting individuals from the plant about the circumstances surrounding her death. He assures them that he will keep their identities confidential. Art's investigation reveals evidence that the plant owner killed Karen to silence her campaign against the plant's safety failures. Here, protecting the information and the identity of Art's sources helped bring this information to light, whereas refusing

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255. See *Branzburg*, 408 U.S. at 694–95 (predicting that the press's use of confidential sources will not dry up if reporters appear before grand juries); see also Toobin, *supra* note 185, at 30, 35 (“[*Washington Post* reporter Walter] Pincus believes that reporters are facing more subpoenas as much because of bad habits that the profession has acquired as because of an unsympathetic public and judiciary. He thinks, for example, that reporters are often too ready to grant confidentiality to their sources.”).

256. Assume, for the purposes of this Comment, that the arrest and search satisfy the Fourth Amendment.

protection could have suppressed it forever.<sup>257</sup> In this way, recognizing the reporter's privilege accomplishes much more than giving blanket immunity to a broad class of professionals; it encourages individuals to provide the type of sensitive evidence necessary to solve society's criminal mysteries.

Appealing to these benefits counters the criticism that the reporter's privilege will frustrate law enforcement and the effective functioning of the grand jury.<sup>258</sup> Although the privilege may frustrate law enforcement needs in some cases, the Court is free to establish a qualified privilege that yields to government needs in those cases. However, recognizing some form of a privilege better protects the range of constitutional interests implicated in this debate.

### 3. Emphasizing the Value the Framers Placed on the Reporter's Privilege Frames the Case as a Battle of Constitutional Interests and Makes the Court More Likely to View a Qualified Privilege as a Satisfactory Compromise

Stressing these mutual benefits will only work, however, if journalists give up their pursuit of an absolute privilege.<sup>259</sup> None of the other professionals protected by privilege rules—including attorneys, doctors, and psychotherapists—can claim *absolute* immunity from testifying.<sup>260</sup> On a more practical level, since the reporter's privilege will necessarily impede

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257. See generally *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (reciting these facts in the context of a civil action between Karen Silkwood's estate and the company that owned the power plant she worked at). The *Silkwood* case has garnered considerable attention over the years, both because of the suspicious circumstances surrounding Karen Silkwood's death and the reporter privilege issues in filmmaker Arthur Hirsch's refusal to reveal his confidential sources. With respect to the former, see *Karen Silkwood Story: What We Know at Los Alamos*, 23 LOS ALAMOS SCI. 252 (1995). With respect to the latter, see Leita Walker, *Saving the Shield with Silkwood: A Compromise to Protect Journalists, Their Sources and the Public*, 53 U. KAN. L. REV. 1215, 1237–45 (2005) (describing how and why the Tenth Circuit recognized a qualified reporter's privilege grounded in the First Amendment and arguing for extending its approach nationally).

258. See *Branzburg*, 408 U.S. at 699–701 (arguing that the need for confidential sources, “even if true, [is] treacherous ground[ ] for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere . . . [T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . [a] subject of overriding and compelling state interest.” (additional quotation marks omitted)).

259. It is important to remember that no constitutional right, including the right to publish, is considered absolute. BICKEL, *supra* note 250, at 86.

260. For example, an attorney cannot invoke the attorney-client privilege when the client sought the attorney's services to aid him in committing a crime. CAL. EVID. CODE § 956 (West 1995 & West Supp. 2007). A doctor cannot invoke the physician-patient privilege regarding communications about his patient's physical condition after the patient files a personal injury claim. *Id.* § 996. A psychiatrist cannot invoke the psychotherapist-patient privilege when she has reasonable cause to believe that her patient is dangerous to herself or others. *Id.* § 1024.

some defendants' constitutional rights and some law enforcement goals, it seems unlikely that the Supreme Court will fully immunize reporters the way some states have.<sup>261</sup> The bullheaded push for an absolute privilege helped stall Congressional efforts to pass a shield law in the 1970s.<sup>262</sup> Journalists should not let it do the same to this effort.

This does not mean that journalists should abandon their constitutional argument, for they must make it the foundation of their case. They should start by reiterating the colonial history, starting with Zenger's trial, moving through the Continental Congresses, and then to the drafting of the Bill of Rights. Next, journalists must redefine "freedom of the press," a phrase that has become a cliché in modern America, but which fueled the colonial separation from England and the creation of American democracy.<sup>263</sup> Can anyone seriously argue that their due process rights do not flow from the freedom of press used to challenge the English libel laws? Justice White may have considered the freedom of the press to be just another historical development, but the Framers knew better. The Framers considered the freedom of the press an essential element of American freedom, "the only effectual guardian of every other right" in the words of James Madison and Thomas Jefferson.<sup>264</sup> Undoubtedly, their view should weigh heavily on the importance of the press and the value of their freedom with respect to other constitutional interests.

Further, with this historical background, journalists must recognize and frame the conflict between interests in epic terms: the First Amendment freedom of press (the root of American democracy) versus the Fifth Amendment right to due process and the People's interest in effective law enforcement (the essence of individual liberty). Can the Supreme Court really say that it values either interest so greatly that one must *always* trump the other? It has already recognized the potential harm to law enforcement activities by fully immunizing journalists from testifying before grand juries. It does not make sense, however, to completely

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261. See *id.* § 1070 (now part of California's constitution, completely immunizing journalists from being forced to reveal their confidential sources in any judicial, legislative, or administrative proceeding).

262. See Ervin, *supra* note 14, at 261–63.

263. See PUTNAM, *supra* note 12, at 5; see also Levy, *supra* note 27, at xix. Longtime Yale law professor Alexander Bickel viewed the reporter's professional interest as, in the words of James Madison, "a sentinel over the public rights." BICKEL, *supra* note 250, at 83 (quoting THE FEDERALIST NO. 51 (James Madison)).

264. Journal of the House of Delegates of the Commonwealth of Virginia, at 31 (Dec. 21, 1798) available at <http://www.yale.edu/lawweb/avalon/virres.htm> (last visited Mar. 23, 2007). The Virginia Resolution of 1798 was written primarily by Madison and Jefferson to oppose the Alien and Sedition Acts passed by the Federalists in Congress and signed into law by President John Adams.

subordinate a journalist's First Amendment rights to those law enforcement interests. In the worst cases, where an individual leaks secret documents for his own gain (as opposed to exposing wrongful conduct) and hides behind the reporter's pledge of confidentiality, pressuring the journalist to testify will probably not induce the criminal to reveal himself. In the BALCO case, for instance, Troy Ellerman did not willingly come forward to spare the *Chronicle* reporters: it was Larry McCormack, Ellerman's colleague when Ellerman served as commissioner of the Professional Rodeo Cowboys Association, who discovered the ploy, "secretly taped a conversation with Ellerman," and then contacted the FBI.<sup>265</sup> Ellerman only began negotiating a plea agreement with the government after F.B.I. agents confronted him with the incriminating statements in December 2006.<sup>266</sup>

Any judge who cherishes the Constitution and respects the principles the Framers preserved when they drafted it will have difficulty resolving these issues. In this case, however, the questions are not designed to be answered. They are designed to provoke thought and promote compromise through "extremeness-aversion."<sup>267</sup> Scholars have frequently noted how:

[G]iving people extreme options can make compromise options easier to support. "Extremeness-aversion" predicts, for example, that within an offered set, options with extreme values are relatively less attractive than those with intermediate values. The addition of an otherwise irrelevant extreme alternative may thus enhance the desirability of an original—and now seemingly moderate—option.<sup>268</sup>

Two famous Supreme Court cases demonstrate how this technique can succeed.<sup>269</sup> In 1971, when the Justice Department sought to prohibit *The New York Times* from publishing the Pentagon Papers, Alexander Bickel (representing the *Times*) opened his brief by opposing the injunction on the grounds that virtually every prior restraint is unconstitutional under the standard announced in *Near v. Minnesota*.<sup>270</sup> He then tempered his argument, saying that "narrow exceptions to the rule against prior restraints . . . may . . . arise . . . in connection with the redress of individual

265. Egelko & Koopman, *supra* note 227, at A1.

266. Egelko, *supra* note 8, at A1.

267. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

268. See *id.* at 77 ("[C]ognitive psychologists have found that the ways in which choices are 'framed,' or presented, can skew decisions.").

269. The following examples derive from Professor Katyal's article on the use of legal theory in arguing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Katyal, *supra* note 265, at 68.

270. See Brief for the Petitioner at 31, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873), 1971 WL 134368.



or private wrongs,” but that an exception allowing the government to restrain political speech could only be imposed “pursuant to a clear legislative mandate, not at the behest of the executive exercising supposed inherent powers.”<sup>271</sup> Bickel focused on this latter statutory argument in his oral argument before the Court,<sup>272</sup> and won.<sup>273</sup>

Similarly, in *Hamdan v. Rumsfeld*, the 2006 case in which the Supreme Court struck down the Bush Administration’s plan for trying accused terrorists before military tribunals, the lawyers for Hamdan first took the broad view that the military tribunals violated the separation of powers because Congress had not authorized them.<sup>274</sup> The petition then emphasized several narrower grounds for reversal, including the tribunals’ noncompliance with the Geneva Conventions.<sup>275</sup> Hamdan’s lawyers focused on these more moderate options during oral argument<sup>276</sup> and won.<sup>277</sup>

A similar strategy can also work in this First Amendment context. As Professor Katyal noted:

Professor Bickel . . . observed that the reason Justice Black was such a First Amendment absolutist was not because he believed in such absolutism, but because he saw taking such an extreme position as necessary to move the doctrine to the middle ground that he actually thought was correct.<sup>278</sup>

Perhaps the current Court needs a prod from the originalist Black, and extremeness-aversion could generate the psychological impact needed to convince the Court to recognize a qualified reporter’s privilege.

## V. CONCLUSION

Despite all this controversy, the Supreme Court has remained reluctant to enter the debate over the reporter’s privilege. For example, in

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271. *Id.* at 32.

272. See Transcript of Oral Argument at 36–38, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (Nos. 1873, 1885) (“The question that I do argue is whether there is inherent Presidential power to make substantive law, not for the internal management of the Government, but outgoing, outlooking substantive law, which can form the basis for a judicially-issued injunction, imposing a prior restraint on speech.”).

273. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

274. See Katyal, *supra* note 265, at 75.

275. *Id.*

276. *Id.*

277. *Hamdan*, 126 S. Ct. at 2798.

278. Katyal, *supra* note 265, at 83.

2005 the Court refused to hear Judith Miller's case,<sup>279</sup> even though it presented important constitutional questions, intense debate in the D.C. Circuit over how to analyze Rule 501, and a wide circuit split over how to interpret *Branzburg*—a cert-worthy case by any measure.<sup>280</sup> Since it only requires four votes to take a case, the *Miller* refusal indicates significant opposition to the reporter's privilege on the Court—clearly more opposition than the Justices showed to the psychotherapist privilege, which it recognized by a 7-2 vote in *Jaffee*.<sup>281</sup>

For that reason, journalists cannot rely as strictly on *Jaffee* as reporters Fainaru-Wada and Williams did in the BALCO case. They need to make a more creative argument that dramatizes the constitutional conflict playing out in the reporter's privilege cases. Only by invoking the importance the Framers placed on the freedom of the press in our constitutional scheme do they have any chance of succeeding.

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279. *Miller v. United States*, 545 U.S. 1150 (2005).

280. See SUP. CT. R. 10(a)–(c) (describing the Court's criteria for evaluating petitions for certiorari).

281. *Jaffee*, 518 U.S. at 3.

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